

FEDERAL TRADE COMMISSION

VS

NC STATE BOARD OF  
DENTAL EXAMINERS

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# ASSESSING CONSEQUENCES



*The Watchword is...*



Active supervision need not entail day-to-day involvement in an agency's operations or micromanage of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interest."

From the Supreme Court Opinion

1. Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.

**Example 1:** A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

**Example 2:** Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

3. In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the “sham exception.”  
Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

**Example 4:** A state statute authorizes the state’s dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

8                   **SECTION 5.** G.S. 150B reads as rewritten:

9                   ...

10   **§ 150B-4. Declaratory rulings and petitions for injunctive relief.**

11                   ...

12           (c) An occupational licensing board as defined in Chapter 93B-1 of the General Statutes  
13 may appear in its own name in superior court in actions for injunctive relief to restrain the  
14 violation of the provisions of a statute administered by the board or of a rule or  
15 order of the board. The superior court shall have the jurisdiction to grant these  
16 injunctions, restraining orders, or take other appropriate action even if criminal prosecution has  
17 been or may be instituted as a result of the violations, or whether the person is a licensee of the  
18 board. The superior court may award the board the reasonable costs, including attorney fees,  
19 associated with the investigation and prosecution of any violation. No board shall issue such  
20 orders independently of the superior court unless specifically authorized to do so by law.  
21

23  
24 **§ 93B-18. Unlicensed activity.**

25  
26 (a) In addition to the powers in its enabling statutes, every occupational licensing board  
27 shall have the authority to investigate unlicensed activity and notify unlicensed persons and  
28 entities of the possible violation of the law and administrative rules and any civil action or  
29 criminal penalty which may be imposed by a Court. Such notification shall not indicate that the  
30 occupational licensing board has made any finding of a violation, but may indicate the board's  
31 belief or opinion that a particular act may violate the board's enabling statutes, include factual  
32 information regarding legislation and court proceedings concerning the potential violation, and  
33 may provide notice of the board's bona fide intention to pursue administrative remedies or court  
34 proceedings with regard to the potential violation.

35 (b) Any occupational licensing board providing notification to unlicensed persons and  
36 entities of a possible violation of the law and administrative rules and any civil action or criminal  
37 penalty which may be imposed by a Court shall include the following statement in such  
38 notification:

39 You are hereby notified that the opinion expressed herein is not a legal determination.  
40 An occupational licensing board does not have the authority to order you to discontinue  
41 your current practices. Only a court may determine that you have violated, or are violating,  
42 any law, and, if appropriate, impose a remedy or penalty for such violation. Further,  
43 pursuant to N.C. Gen. Stat. § 150B-4, you may have the right, prior to the initiation of any  
44 court action by the occupational licensing board, to request a declaratory ruling regarding  
45 whether your particular conduct is lawful. You are further notified that any right to a  
46 declaratory ruling supplements any other legal rights that you may already have to establish  
47 the legality of your conduct with respect to the goods or services you offer or provide.

**§ 93B-19. Jurisdictional disputes between boards.**

1  
2       It is the policy of this State that any jurisdictional dispute among occupational licensing  
3 boards should be settled through informal procedures. If the occupational licensing boards do  
4 not agree to a resolution of the dispute through informal procedures, any affected board may  
5 commence an administrative proceeding to resolve the jurisdictional dispute by filing a petition  
6 with the Office of Administrative Hearings and serve such petition on all of the affected boards.  
7 Once such a petition is filed and the required fee is paid, the dispute shall become a “contested  
8 case” and shall be conducted by the Office of Administrative Hearings under Articles 3 and 4,  
9 Chapter 150B.

*"§ 93B-2. Annual reports required; contents; open to inspection; sanction for failure to report.*

(e)(b) The reports required by this section shall be open to public ~~inspection~~inspection and shall be posted on the internet website of the occupational licensing board.

(d)(c) The Joint Legislative Administrative Procedure Oversight Committee shall review the reports submitted pursuant to this section and shall notify any board that fails to file the reports required by this section. Failure of a board to comply with the reporting requirements of this section by October 31 of each year shall result in a suspension of the board's authority to expend any funds until such time as the board files the required reports. Suspension of a board's authority to expend funds under this subsection shall not affect the board's duty to issue and renew licenses or the validity of any application or license for which fees have been tendered in accordance with law. Each board shall adopt rules establishing a procedure for implementing this subsection and shall maintain an escrow account into which any fees tendered during a board's period of suspension under this subsection shall be deposited.

# *THE END*

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